(1) of section 40. It then submitted a return to the appellant showing the total amount of such deduction ($829,542.48). Under sub-section (3) of section 40 the appellant had to compare that amount with the aggregate of —

(a) the amount of the tax payable by the company and

(b) the amount of the balance (if any) carried forward from any previous year of assessment in accordance with the provisions of sub-section (5) of section 40.

Under sub-section (4), if the amount of deduction exceeded the aggregate, the excess became a debt due to the appellant.

It is at this point that a dispute arose between the parties. The Revenue says that the amount of the tax payable by the company means not the amount of the tax ordinarily payable by the company ($595,620.41) on its chargeable income, but that amount as reduced by the tax credit due to the company. The company, on the other hand, says that the amount of the tax payable by the company means simply the amount of the tax payable by it on its chargeable income without deduction of the United Kingdom tax credit. It is agreed that if the Revenue is right, there is an excess and its claim must succeed, but if the company is right, there is no excess and Revenue's claim must be dismissed.

Mr. Mooney for the company repeats before us the arguments he used in the lower court, and as they have been well summarised in the judgment appealed against, there is no need for us to reproduce them.

In our judgment, Mr. Mooney's arguments cannot be accepted.

It should be noted that the relevant words in dispute did not consist simply of the words reproduced in the first sentence of this judgment, but consisted of the words "the amount of the tax *payable* by the company . . . *in accordance with the provisions of this Ordinance* . . . ". Observe the words underlined. What the Revenue must have regard to is not simply the amount of the tax payable by the company on its chargeable income, but the amount of the tax payable in accordance with the provisions of the Ordinance. To determine the amount of the tax actually payable by the company, one must therefore look at all the relevant provisions of the Ordinance, the most important being section 46. Ordinarily the company's tax liability would have been computed simply on its chargeable income and it would have had to pay tax on the amount so computed, but as it had already paid tax to the United Kingdom Revenue on its dividends and as there was a double taxation agreement made under the authority of section 45 between our Government and the United Kingdom Government, the Double Taxation (Relief) (United Kingdom) Order, 1949, printed at page 149 of the reprint of the Ordinance (Reprint No. 8 of 1966)), section 46 applied and the company became entitled to relief called tax credit. This credit was not the amount of tax it had actually paid to the U.K. Revenue, but fell to be computed in accordance with the formula set out in sub-sections (3) and (4) of section 46 (the amount is not in dispute). Then comes the all-important sub-section (2) which says —

"The amount of the income tax chargeable in respect of the income shall be reduced by the amount of the credit. . .".

This means, in our opinion, that in fact the amount of the tax payable by this company was an amount as reduced by the tax credit due to it under the double taxation agreement, and not the amount of tax that would have been due ordinarily on its chargeable income. In construing the disputed words in sub-section (3) of section 40, we do not see how sub-section (2) of section 46 can be ignored. We therefore hold that the disputed words mean the amount of the tax due on the company's chargeable income as reduced by its tax credit. In our view, this is quite plain from the language of the Ordinance itself.

We are not unmindful of Mr. Mooney's argument that the language of sub-section (3) of section 40 of the Ordinance should be contrasted with the language of the corresponding provision (sub-section (4) of section 108) of the Income Tax Act No. 47 of 1967 which expressly allows the deduction of any tax credit from the tax chargeable on the company. In our judgment, it is plain that the same may be done even under the 1947 Ordinance and the change of language in the current Act was made not to remove any ambiguity but *ex abundanti cautela*.

We would therefore set aside the judgment appealed against and enter judgment for the appellant as prayed, the respondent company to pay costs here and below.

Appeal allowed.

Solicitors: *Skrine & Co.*

TONG LEE HWA & ANOR. v. CHIN AH KWI
TONG CHONG FAH v. CHIN AH KWI

[F.C. (Ong C.J. (Malaya), Gill & Ali F.JJ.) April 1, 1971]

[Kuala Lumpur — Federal Court Civil Appeals Nos. 40 & 41 of 1970]

Probate and Administration — Settlement of probate action on terms incorporated in schedule to court order — Application to vary terms of settlement — Contracts (Malay States) Ordinance, 1950, s. 61.

Probate and Administration — Wills — Probate action — Settlement of on terms incorporated in schedule to court order — Agreement entered into by parties in terms of the settlement — Effect of.

Contract —Probate action — Settlement of on terms incorporated in schedule to court order — Agreement entered into by parties in pursuance of settlement — New contract — Effect of — Contracts (Malay States) Ordinance, 1950, s. 61.

Practice and Procedure — Judgment by consent — Variation order — Whether court has jurisdiction to make — "Liberty to apply" — Meaning of — R.S.C. 1957, O. 28, r. 11.

This case originated as a probate action which arose from the existence of three or four wills alleged to have been executed by one Chi Liung deceased shortly before her death. The deceased was the governing director

of a private company known as Chi Liung & Son Ltd., holding only 30 out of the 3,000 shares issued by the company. Out of the remaining 2,970 shares, the present appellants between themselves owned 2,100 shares. After four days' hearing, the parties agreed to settle their dispute on terms set out in the schedule to a court order dated December 15, 1969. The order provided that the estate of Chi Liung deceased be administered as on an intestacy, that the terms of the settlement agreed to between the parties and annexed as a schedule to the court order be made a rule of court and that all parties including those who were not parties to the probate action, do have liberty to apply. The settlement was mainly concerned with the manner in which the parties were to acquire, by purchase, shares in the company.

Sometime after the settlement, one of the parties filed a notice of motion seeking to extend the period fixed for her to complete the purchase of the shares. Although it was objected to by the other parties, the learned judge who heard the motion granted an order of extention of time on March 21, 1970.

This was an appeal from the order granting extention of time. The issue which arose turned on the court's power or jurisdiction to vary its own order.

Held, allowing the appeal: (1) the terms of settlement undoubtedly formed part of the court order which must be assumed to have been made with the consent of all the parties in the probate suit. The form in which it was made could not give rise to any question;

(2) although there was no specific mention in the court order regarding stay of proceedings, there could be no doubt that it was a final order in that it finally determined the dispute between the parties in relation to the wills set up, which was the only subject-matter of the probate action;

(3) in the present case, the terms of settlement, which were not within the ambit of the probate action, constituted a contract between the parties to the probate action in relation to their shares in the company. A substantial number of shares in the company belonged to persons who were not parties to the action. As a contract for the sale and purchase of all the company's shares required the concurrence of those persons, the parties to the action were to execute and to procure the execution of an agreement by all those other persons. Such an agreement was in fact duly executed. The contract, embodied in the terms of settlement in the schedule to the order in so far as it related to the company's shares, was accordingly fully performed by the execution of that agreement by all the necessary parties, including parties who were not parties to the probate action. As from the execution of that agreement the rights and obligations of all parties in relation to the company's shares must be governed by that agreement;

(4) nowhere in the schedule to the arrangement was there any reference to that schedule being made a rule of court. It was the schedule to the order which was made the rule of court. As an agreement in terms of the settlement was in fact made, particularly when it involved parties other than those who were parties to the probate action, the result was to supersede the whole of the order, with the exception of two clauses which could still have been summarily enforced by an action in the probate proceedings. Apart from those two clauses, the rest of the schedule no longer existed for it to operate as a rule of court. Thus, by entering into the agreement contemplated by the order, the parties in fact agreed to substitute a new contract within the meaning of section 61 of the Contracts (Malay States) Ordinance, 1950. so that the original contract as contained in the order need not be performed. This new contract could be enforced only in a fresh action for specific performance or damages, to which all parties to the agreement would have to be joined, and its terms could not be varied on a motion in the probate action itself;

(5) after a judgment by consent has been passed and entered, it cannot afterwards be varied on the ground of mistake, except for reasons sufficient to set aside an agreement. The general rule is that after a judgment has been passed and entered, even where it has been taken by consent and under a mistake the court cannot set it aside otherwise than in a fresh action brought for the purpose unless (a) there has been a clerical slip or omission, or (b) the judgment as drawn up does not correctly state what the court actually decided and intended to decide, in either of which cases the application may be made by motion in the action. The same rule must apply, *a fortiori*, where the parties have entered into an agreement in pursuance of the terms of settlement embodied in the consent order;

(6) the words "liberty to apply" in an order, *prima facie*, mean that when the order was drawn up its working out might involve matters on which it might be necessary to obtain a decision of the court; they do not confer any right to ask the court to vary the order;

(7) therefore what the learned judge purported to do by his order of March 21, 1970, was to vary the terms of his order of December 15, 1969, which order had already been fully performed by the parties. This he did not have the jurisdiction to do in the same proceedings.

Tomlin order considered.

Cases referred to:-

(1) *Dashwood* v. *Dashwood* [1927] W.N. 276.

(2) *Green* v. *Rozen & Ors.* [1955] 2 All E.R. 797.

(3) *Chua Chee Chor* v. *Chua Kim Yong & Ors.* [1960] M.L.J. 127.

(4) *Pryer* v. *Gribble* (1875) L.R. 10 Ch. App. 534.

(5) *In re Shaw* [1918] P. 47.

(6) *Attorney-General* v. *Tomline* (1877-8) 7 Ch. D. 388.

(7) *Ainsworth* v. *Wilding* [1896] 1 Ch. 673.

(8) *In re Hearn* (1913), 108 L.T. 452, 737.

(9) *McCallum* v. *Country Residences Ltd.* [1965] 1 W.L.R. 657.

(10) *E.F. Phillips & Sons Ltd.* v. *Clarke* [1970] 1 Ch. 322.

(11) *Cristel* v. *Cristel* [1951] 2 All E.R. 574.

(12) *Poisson and Woods* v. *Robertson and Turvey* (1901-2), 50 W.R. 260, 261.

(13) *In re South American and Mexican Company, Ex parte Bank of England* [1895] 1 Ch. 37.

(14) *Jenkins* v. *Robertson* L.R. 1 H.L.Sc. 117.

(15) *Abbott* v. *Abbott* (1930), 47 T.L.R. 207, 222.

FEDERAL COURT.

G. S. Hill (*R. Talalla* with him) for appellants in Civil Appeal No. 40 of 1970.

N. A. Marjoribanks for appellant in Civil Appeal No. 41 of 1970.

Chung Shiu Tett (*S. K. Lee* with him) for the respondent.

Cur. Adv. Vult.

Ong C.J. (Malaya): I have had the advantage of reading the judgments of Gill and Ali F.JJ. and agree that the appeals be allowed with costs.

Gill F.J.: The parties to these two appeals were parties to proceedings which began as a probate action. being Probate Suit No. 3 of 1969 in the High Court at Kuala Lumpur. In that suit as originally constituted, the plaintiff was Tong Chong Fah, the appellant in Civil Appeal No. 41 of 1970, and the defendants were Chin Ah Kwi(f) alias Chin Foong Ooi(f), the respondent in each of the two appeals, and Tong Lee Hwa and Tong Young Fah, the appellants in Civil Appeal No. 40 of 1970. By an order

of court dated October 13, 1969, made on the application by way of a summons for direction of Chin Ah Kwi(f) as the first defendant, the suit was given an alternative title with Chin Ah Kwi(f) as the plaintiff and Tong Chong Fah, Tong Lee Hwa and Tong Young Fah as the defendants. That order, however, was never extracted, and throughout the proceedings and in the order made on the final disposal of the suit, Tong Chong Fah was referred to as the plaintiff, Chin Ah Kwi(f) as the first defendant, Tong Lee Hwa as the second defendant and Tong Young Fah as the third defendant.

The probate action arose from the existence of three, or possibly four, wills alleged to have been executed by one Chi Liung deceased shortly before her death. Madam Chi Liung presumably was the founder of a company known as Chi Liung & Son Ltd. (hereinafter called "the company") of which she was the governing director until the date of her death, but as on that date she held only 30 out of the 3,000 shares issued by the company. Out of the remaining 2,970 shares, Tong Chong Fah had 900 shares, Tong Lee Hwa 600 shares and Tong Young Fah also 600 shares. In other words, the present appellants between themselves owned 2,100 shares out of a total of 3,000 shares in the company.

The suit came up for hearing before Chang Min Tat J. After four days' hearing the parties agreed to settle their dispute on terms which were incorporated in an order of court dated December 15, 1969. The order provided that the estate of Chi Liung deceased be administered as on an intestacy, that the terms of settlement agreed to between the parties and annexed as a schedule thereto be made a rule of court, that there be no order as to costs save insofar as was necessary to give effect to the said terms of settlement, and that all parties do have liberty to apply. Clause 1 of the schedule to the order provided for the estate to be administered by the plaintiff and the second defendant as the first in order of entitlement, and the provisions as regards costs were contained in clause 12 of the schedule.

The other clauses in the schedule to the order related to matters which went beyond the ambit of the original dispute and could not have been enforced in the original action. To take only those clauses which are relevant for the purpose of these two appeals, clause 3 provided that the first defendant was to have an option to purchase the shares in the company of the persons named therein at the stated price of $2,000 per share, on the undertaking by the plaintiff and the second defendant that the debts of the company will not at the date of the completion of such sale exceed $3 million.. The shares which the first defendant had the option to buy were the 2.100 shares belonging to the appellants, 150 shares belonging to each of the estates of Fun Siew and Tong Poh Hwa deceased and 60 shares each of Tong Hui Peng and Tong Hui See, thus making a total of 2,520, which meant that she had to raise a sum of more than $5 million if she was to be able to exercise the option. Clause 4 of the agreement provided that the completion of purchase as contemplated by clause 3 was to take place on February 29, 1970, time being of the essence. In default of completion of such purchase by the first defendant by the due date, the plaintiff and the second defendant were entitled to buy from the beneficial owners thereof all the shares of the company not included in the sale contemplated by clause 3 at a figure to be determined by an accountant and two qualified valuers, as provided in clauses 5 and 6. Under clause 8 of the schedule, pending completion all parties were to have reasonable access to the company's books and records.

Any dispute under the agreement was to be referred to arbitration, as provided in clause 13. Clause 14 of the schedule provided for the parties to the suit to execute and procure the execution by all other necessary parties of an agreement embodying the terms of the schedule. Such an agreement was in fact executed on the same date as the date of the order. To this agreement was annexed a schedule the terms of which were identical with the terms contained in the schedule to the court order.

On February 26, 1970 the first defendant took out a notice of motion in which she asked for an order, *inter alia*., that paragraph 4 of the schedule to the order of court dated December 15, 1969 be varied by substituting for "29th February, 1970" "such date as should seem fit and proper to the court". The facts on which the applicant relied in support of a motion were set out in her affidavit in support of the motion. Her major complaint as summed up in paragraph 3 of her affidavit was that she was not given reasonable access to the books and records before the completion date as contemplated by clause 3 of the schedule to the order.

When the motion came up for hearing on March 6, 1970, counsel for the applicant argued that it was not likely for anyone to have five million dollars, and that there was no obligation to get the money ready until full disclosure was made. Counsel for the second defendant contended that reasonable access had in fact been afforded. Counsel for the plaintiff pointed out that as other parties had entered into an agreement in pursuance of the court order, there was no power in the court to extend the time for completion when such other parties were not before the court. The learned judge therefore made an order adjourning the proceedings to March 21, 1970 for service on the other four shareholders mentioned in clause 3 of the schedule. Those shareholders, of course, were not parties to the probate suit. They were served, but at no stage were they made parties to the suit

On March 21, 1970 the objection taken to the application was that it was entirely misconceived, as the proper course on a consent order would be to sue for specific performance, it being argued that the schedule to the agreement containing the terms of settlement was not an order of court or an undertaking to the court. For this argument reliance was placed on *Dashwood* v. *Dashwood*.[1] That was a case in which by a consent order made in a partnership action all further proceedings were stayed

"except so far as may be necessary for the purpose of carrying this order and the terms agreed between the parties and set out in the schedule hereto into effect".

The scheduled terms confirmed the defendants' right to purchase the plaintiff's share in the capital, subject to certain modifications of the provisions in the articles of partnership, of which the material part was that the plaintiff covenanted with the defendants that he would not for three years from November 19, 1926 carry on the business of an undertaker within a radius of three miles from the Guildhall, Portsmouth. The defendants moved for committal of, or the issue of, a writ of attachment against the plaintiff on the ground that he had in fact carried on such business within the stipulated radius. The motion failed because Tomlin J. held that, as the terms in the schedule were not an order of the court which ought directly to be enforced by proceedings for contempt, the proper course was to apply for specific performance or an injunction, and then to base proceedings for contempt on any subsequent breach.

After this decision Tomlin J. stated that in future when an action was proposed to be stayed on agreed terms to be scheduled to the order the order should read as follows: -

"And, the plaintiff and the defendant having agreed to the terms set forth in the schedule hereto, it is ordered that all further proceedings in this action be stayed, except for the purpose of carrying such terms into effect. Liberty to apply as to carrying such terms into effect [see *Practice Note* [1927] W.N. 290]."

Such an order has since come to be known as a *Tomlin order*.

The learned judge rejected the argument put forward in opposition to the application, on the ground that the order in the present case was clearly not a *Tomlin order*, as the terms of the settlement were expressly made a rule of court. He then went on to say that *Dashwood* v. *Dashwood*[1] had absolutely no relevance to this case, and that on the authority of *Green* v. *Rozen and Others*[2] the first defendant was properly before the court. In the result he made an order making two alterations in the schedule to the order of court made in the same proceedings on December 15, 1969. The first of these alterations amended the date "29th February, 1970" to read "28th February, 1970". This error in the order obviously crept in because everybody must have thought that 1970 was a leap year. The appellants do not dispute the validity of this amendment which they themselves supported. The second part of the order purported to extend the time for completion referred to in paragraph 4 of the said schedule to April 21, 1970. It is against this part of the order that the appellants in the two appeals have now appealed.

I would pause here to state the facts in *Green* v. *Rozen*[2] in order to consider whether that case has any bearing on the present case. This plaintiff in that case had brought an action to recover £500 money lent by him to the defendants jointly, and a further sum of £50, alleged to have been due from the first defendant as consideration for making the loan to the three defendants. When the action came on for hearing, counsel informed the court that the action had been settled and what the terms of settlement were. By the agreed terms, which were set out on the backs of counsel's briefs and signed by counsel for both parties, the defendants were to pay to the plaintiff a sum of £450 by instalments, on the dates stated, and the taxed or agreed cost with the final instalment. If any instalment was in arrear, the whole debt and costs became due and payable at once. The court was not asked to make any order whatever, so that the terms of settlement were not made an order of court, and there was no order for the proceedings to be stayed. The defendants having failed to pay the last instalment and the costs, the plaintiff made an application in the original action asking for judgment for the amount of the final instalment and an order for the costs. Slade J. held that the application must be refused because, the court having made no order in the action, the agreement compromising the action between the parties completely superseded the original cause of action and the court had no further jurisdiction in respect of that cause of action. His Lordship went on the say that if the terms of the new agreement were not complied with, then the injured party must seek his remedy on the new agreement. In other words, the plaintiff's only remedy was to bring an action on the agreement of compromise.

Counsel for the appellants in this case do not dispute that the order in the present case is not a *Tomlin order*, but they contend that *Green* v. *Rozen*,[2] on which the learned trial judge relied for the making of the order appealed from, also does not directly help in the present case, as that case merely recites a number of different methods by which an action can be disposed of when terms of settlement are arrived at when the action comes on for trial or in the course of the hearing, as stated by Slade J. at page 799. I entirely agree with that contention. With respect to the learned judge, it is not clear how he arrived at his conclusion that *Green* v. *Rozen*[2] was helpful in the present case, especially when he has not expressly stated which of the different methods of disposal mentioned by Slade J. in that case applied to the present case. The circumstances of that case were entirely different from the circumstances in the present case, which, in the words of Slade J. in that case, can with some degree of certainty and accuracy be described as the fourth case

"where the court, at the request of the parties, has made an absolute and unqualified order for a stay of all further proceedings . . . in contradistinction to the common form of order where the stay of all further proceedings is qualified by the words 'save and for the purpose of carrying the terms into effect' ".

There was of course no specific mention in the order in this case regarding stay of proceedings, but there can be no doubt that it was a final order in that it finally determined the dispute between the parties in relation to the wills set up, which was the only subject-matter of the probate action.

The major question for determination in these two appeals is whether the learned trial judge had the jurisdiction to make the order appealed from. When dealing with this question one has constantly to bear in mind that the dispute between the parties to this appeal was brought to court by way of a "probate action", which is defined by section 2 of

the Probate and Administration Ordinance, 1959 to mean

"a cause or matter in which a petition for probate or administration is contested by any person and includes an application to alter or revoke any ground of representation".

Thus, it was held in *Chua Chee Chor* v. *Chua Kim Yong & Ors.*[3] that in a proceeding upon an application for probate of a will the only question which the court is called upon to determine is whether the will is true or not, and that it is not the function of the court to determine any question of title with reference to the property covered by the will.

It is clear that the terms of settlement contained in the schedule to the order, with the exception of clause 1 and the first part of clause 12, were entirely outside the scope of the probate suit, although they were made a rule of court. The same terms of settlement were embodied in the schedule to the agreement, as contemplated by the order. This subsequent agreement included matters which were extraneous to the probate suit, and it was executed not only by the parties to the suit but also by persons who had nothing to do with it. It would therefore seem to follow that such terms are unenforceable in the probate suit itself. An authority for that proposition is to be found in the case of *Pryer* v. *Gribble.*[4] That was a redemption suit against the mortgagee in possession of business premises. The parties agreed upon a compromise under which the mortgagor was to pay a fixed sum on a certain day, and the mortgagee was to carry on the business in the meantime and give up possession on payment, and all proceedings in the suit were to be stayed. It was held, reversing the decision of Malins V.C., that the agreement for compromise could not be enforced on a motion in the suit, but that a fresh suit must be filed for specific performance. James L.J. said at page 539:

"An agreement of this kind, involving a great number of details, some of which would not have been within the subject of this suit, cannot be specifically performed upon interlocutory application. ... It is a contract, the specific performance of which is beyond the scope of this suit, and cannot be obtained except by a suit regularly instituted for that purpose. If this were a simple agreement between the parties to stay a suit, or to have a bill dismissed, very likely the court ought to give effect to that, as it would give effect to any other agreement relating solely to the conduct and prosecution of the suit. But when those matters are mixed up with a great number of details, money to be paid, and acts to be performed, it is by far beyond the scope, as it seems to me, of an interlocutory motion, and far outside the jurisdiction of this court on interlocutory motion."

In the present case, the terms of settlement which were not within the ambit of the probate action constituted a contract between the parties to the probate action in relation to their shares in the company. A substantial number of shares in the company in fact belonged to persons who were not parties to the action. As a contract for the sale and purchase of all the company's shares required the concurrence of those persons, the parties to the action were to execute and to procure the execution of an agreement by all those other persons. Such an agreement was in fact duly executed. The contract embodied in the terms of settlement in the schedule to the order, in so far as it related to the company's shares, was accordingly fully performed by the execution of that agreement by all the necessary parties, including parties who were not parties to the probate action. As from the execution of that agreement the rights and obligations of all parties in relation to the company's shares must be governed by that agreement.

It is to be observed that nowhere in the schedule to that agreement is there any reference to that schedule being made a rule of court. It was the schedule to the order which was made the rule of court. Had no agreement been made between the parties in pursuance of the terms of settlement embodied in the order, they could perhaps have been made the subject of summary enforcement by way of an interlocutory application on the authority of *In re Shaw,*[5] but as an agreement in terms of the settlement was in fact made, particularly when it involved parties other than those who were parties to the probate action, the result was to supersede the whole of the order except clause 1 and the first part of clause 12 which alone could still be summarily enforced by an application in the probate proceedings. Apart from those two clauses, the rest of the schedule no longer exists for it to operate as a rule of court. By entering into the agreement contemplated by the order, the parties in fact agreed to substitute a new contract within the meaning of section 61 of the Contracts (Malay States) Ordinance, 1950, so that the original contract as contained in the order need not be performed. This new contract can be enforced only in a fresh action for specific performance or damages, to which all parties to the agreement would have to be joined, and its terms cannot be varied on a motion in the probate action itself.

Clause 13 of the schedule to the agreement provided that any dispute in the agreement was to be referred to arbitration. Clearly the arbitration clause would not apply in the case of a dispute as to the terms of the order made on December 15, 1969, because this would be inconsistent with the liberty to apply to enforce the order. The arbitration clause, however, became relevant once the agreement of December 15, 1969 was executed by all the parties. Thereafter, the intention of the parties clearly was that any dispute as to the terms of the agreement should be the subject of a reference to arbitration rather than a reference to court, as the court would have no jurisdiction to vary the terms of the agreement against the will of the contracting parties.

After a judgment by consent has been passed and entered, it cannot afterwards be varied on the ground of mistake, except for reasons sufficient to set aside an agreement (see *Attorney-General* v. *Tomline).*[6] The general rule is that after a judgment has been passed and entered, even where it has been taken by consent and under a mistake, the court cannot set it aside otherwise than in a fresh action brought for the purpose unless (a) there has been a clerical mistake or an error arising from an accidental slip or omission, or (b) the judgment as drawn up does not correctly state what the court actually decided and intended to decide, in either of which cases the application may be made by motion in the action (see

Ainsworth v. *Wilding).*[7] The same rule must apply, *a fortiori*, where the parties have entered into an agreement in pursuance of the terms of settlement embodied in the consent order.

In re Hearn[8] is usually cited as the authority for the proposition that a consent order, embodying a new agreement between the parties beyond the scope of the action, can only be enforced in a fresh suit. In that case not only did the compromise go outside the ambit of the original action but, first, no liberty to apply had been reserved at all and the stay was absolute and unqualified, and, secondly, the relief sought by an application in the same proceedings was not a mere enforcement of the agreed terms but to modify them to give effect to the original intention in changed circumstances. It was held by Sargant J. that such an application could not be made by a summons in the original action which was commenced in 1908 by originating summons, but that independent proceedings must be taken. An appeal against that decision was dismissed by the Court of Appeal. The main ground for the decision in the Court of Appeal was that the applicant was seeking relief against trustees outside the ambit of the compromise itself, but Cozens-Hardy M.R. went on to say at page 738:

"But apart from that, although that alone is a sufficient ground for dismissing this appeal, there is also this further ground — namely, that this is an attempt to enforce, not a title under the will, which alone was dealt with by the trustees' summons, but an entirely new and independent bargain between the husband and the wife, and that could not be done in the old proceedings."

In *McCallum* v. *Country Residences Ltd.*[9] the compromise was not outside the ambit of the original action but there was no *Tomlin order*. Danckwerts L.J. thought that there was an implied term that the compromise should be embodied in such an order, but the majority of the Court of Appeal thought otherwise. Both Lord Denning M.R. and Danckwerts L.J., however, thought that terms embodied in a *Tomlin order* could be enforced in the original action. Danckwerts L.J. in particular said at page 661:

"I do not think it is decisive of this matter that a compromise may result in a fresh cause of action which, if it has to be enforced, will require a writ and fresh proceedings. It seems to me that the procedure in the present case was designed to do away with further proceedings and the issue of a fresh writ. It was precisely to secure that that the *Tomlin* form of order was evolved."

In *E. F. Phillips & Sons Ltd.* v. *Clarke*[10] the parties to the action having come to a compromise, a motion for an interlocutory injunction was treated as a motion for judgment and the terms agreed were embodied in an order and schedule in *Tomlin* form, all proceedings in the action, except for the purpose of carrying the terms into effect, being stayed and the parties being at liberty to apply. The defendant having failed to comply with the terms in the schedule, the plaintiff sought to enforce them by a motion in the original action. The motion was allowed, it being held that where there was an order in the case in the normally appropriate form, with a qualified stay and liberty to apply, and the application to the court was strictly to enforce the terms embodied in the order and schedule, an order giving effect to those terms could be obtained under the liberty to apply in the original action, notwithstanding that they might go beyond the ambit of the original dispute and could not have been enforced in the original action. Goff J. said at page 324:

"There is no express authority that a *Tomlin order* can be enforced by an application in the same action. It is clearly settled by *Dashwood* v. *Dashwood*[1], that it cannot be enforced directly by committal proceedings; it is first necessary to obtain an order requiring the party in breach to perform his obligation under the compromise. But the question is, can such an order be obtained in the original action? In the absence of authority I would have thought it clearly could have been even where, as in the present case, a compromise goes outside the ambit of the original action — which compromises often do — because it is part of the form of order that the proceedings are not absolutely stayed but are stayed except for the purpose of carrying the terms into effect, and liberty to apply as to carrying the terms into effect is expressly reserved. In *Dashwood* v. *Dashwood*[1] Tomlin J. himself appears to have visualised that that might be enforced either independently or in a new action."

His Lordship then referred to the strong *dicta* in *McCallum* v. *Country Residences Ltd.*,[9] to which I have referred in the last paragraph of this judgment, and went on to distinguish *In re Hearn*[8] on the ground that the relief sought in that case was not a mere enforcement but a variation and that there was no liberty to apply and the stay was absolute and unqualified.

It would appear at first sight that the order made by the learned judge in this case can be justified on the decision of Goff J. in *E. F. Phillips & Sons Ltd.* v. *Clarke*,[10] but in my judgment this case is clearly distinguishable from that case on several grounds, the most important of which is that here the parties to the action and other necessary parties had entered into an agreement as contemplated by the terms of the settlement. In other words, parties other than the parties to the action were involved. Moreover, the stay was absolute and unqualified, and the relief sought as in *In re Hearn*[8] was not mere enforcement but variation.

It would appear that the learned judge also based his order on the provision as regards liberty to apply. This is what he says in his grounds of judgment:

"To my mind, this application did not come within the line of cases which lays down the court has no jurisdiction in the same proceedings to vary an order made by it in the proceedings. There was in this case a provision for liberty to apply and I am unable to see any better reason for the liberty than to meet a situation such as this."

With respect to the learned judge, the words "liberty to apply" in an order, *prima facie*, mean that when the order was drawn up its working out might involve matters on which it might be necessary to obtain a decision of the court; they do not confer any right to ask the court to vary the order (see *Cristel* v. *Cristel.*)[11] In *Poisson and Woods* v. *Robertson and Turvey*[12] Vaughan Williams L.J. said:

"There was a judgment, and under it it was plain that the plaintiff had got two-eighths of what had been called a dormant right and one-eighth of what had been called an active right. That judgment reserved 'liberty to apply', but that did not take the matter any further. All that the court had been called to adjudicate upon had been adjudicated upon, and the action was not of such a nature as that any consequential remedy had to be worked out."

The position would appear to be the same in the present case.

Another reason given by the learned judge for making the order is to be found in the following passage in his grounds of judgment: -

"In any event, the equities of the first defendant's application as contrasted with the stand taken particularly by the second defendant require that where the delay in the completion was occasioned by the default of the second defendant for his own end, the time fixed for completion must be extended, if necessary, by the exercise of the court's discretion."

Again, with respect to the learned judge, the equities of the case had nothing to do with the application and, in my judgment, this was not the sort of application in which the court could exercise any discretion. The applicant signed the agreement with her eyes open. Her offer to buy the shares was a fixed sum offer qualified by reference to the quantum of the debts of the company, which was covered by the warranty given by the plaintiff and the second defendant in clause 3 of the agreement. Completion referred to in clause 8 of the agreement could, therefore, apply strictly only to completion under clause 7 and not to completion under clause 3, because for the purpose of completion under clause 3 no access to the company's books and records was required.

To sum up, what the learned judge purported to do by his order of March 21, 1970 was to vary the terms of his order of December 15, 1969, which order had already been fully performed by the parties by the execution of an agreement in pursuance of that order. This, in my judgment, he did not have the jurisdiction to do in the same proceedings.

I would therefore allow the appeal, setting aside the order made by the learned judge, with costs to the appellants both here and in the court below.

Ali F.J.: The question or questions for consideration in these appeals are questions of law. I shall, therefore, refer only to so much of the facts as may be necessary for the purpose of this judgment.

The parties in this appeal were parties to a settlement, the terms of which were set out in the schedule to a court order dated December 15, 1969. The settlement was mainly concerned with the manner in which the parties were to acquire, by purchase, shares in a private company, Chi Liung & Son Ltd. The clear purpose of the settlement was to enable the disputing parties in Probate Suit No. 3 of 1969 to gain control over the affairs of the company, thereby avoiding the heavy cost of litigation which might otherwise have arisen. Some 10 weeks after the settlement, on February 26, 1970 one of the parties, Madam Chin Ah Kwi(f) alias Chin Foong Ooi(f) filed a notice of motion seeking to extend the period fixed for her to complete the purchase of the shares. Although it was objected to by the other parties, the learned judge who heard the motion granted extension of time taking the view that Madam Chin Ah Kwi(f) alias Chin Foong Ooi(f) has, unreasonably, been denied access to the company's books and records, "contrary to the letter and spirit of the compromise settlement". This is an appeal from the order granting the extension of time.

The question which arises necessarily turns on the court's power or jurisdiction to vary the court order. A determination of the question in favour of the appellants will be sufficient to conclude this appeal.

The terms of settlement undoubtedly formed part of the court order which must be assumed to have been made with the consent of all the parties in the probate suit. In short, the order was a consent order. The form in which it was made cannot give rise to any question. Whether it is in the form of a *Tomlin order* or of any one of those referred to in the judgment of Slade J. in *Green* v. *Rozen & Ors.*[2] matters little since we are not here concerned with the manner in which a consent order is to be enforced as in the case of *Dashwood* v. *Dashwood.*[1] In *Green* v. *Rozen & Ors.* the terms of settlement were agreed before the hearing of the action and these were recorded on the back of counsel's briefs and were not made an order of court. The application to the court for judgment following a breach of one of the terms of settlement was refused. In the course of his judgment, Slade J. referred to the various ways in which an action can be disposed off where the terms of settlement are arrived at. I cannot find anything in that case which is germane to the present. The question here is whether a party to a settlement has the right to apply to vary a consent order. In *In re South American and Mexican Company, Ex parte Bank of England*[13] Vaughan Williams J. said on page 45:

"... It has always been the law that a judgment by consent or by default raises an estoppel just in the same way as a judgment after the court has exercised a judicial discretion in the matter. The basis of the estoppel is that, when parties have once litigated a matter, it is in the interest of the estate that litigation should come to an end; and if they agree upon a result, or upon a verdict, or upon a judgment, or upon a verdict and judgment, as the case may be, an estoppel is raised as to all the matters in respect of which an estoppel would have been raised by judgment if the case had been fought out to the bitter end."

Jenkins v. *Robertson*[14] was referred to as an exception to the general rule inasmuch as it was a decision on the law of Scotland and not a decision on the general law of the land. Vaughan William J.'s. decision was affirmed by the Court of Appeal. Lord Herschell L.C. delivering the main judgment said on page 50:

"... The truth is, a judgment by consent is intended to put a stop to litigation between the parties just as much as is a judgment which results from the decision of the court after the matter has been fought out to the end. And I think it would be very mischievous if one were not to give a fair and reasonable interpretation to such judgments, and were to allow questions that were really involved in the action to be fought over again in a subsequent action. I think, therefore, the judgment should be affirmed, and the appeal dismissed with costs."

That, in my judgment, should be sufficient to dispose of the question whether or not the learned judge in this case had the power to vary the consent order of December 15, 1969. But His Lordship has construed the expression "liberty to apply" in the order as giving Madam Chin Ah Kwi(f) alias Chin Foong Ooi(f) the right to apply for a variation of the order. With respect, I disagree. This expression "liberty to apply" was discussed at some length in *Cristel* v. *Cristel.*[11] It was a case in which by agreement between the par-

ties, husband and wife, the master made an order for possession of the matrimonial home in favour of the husband but suspended it until the husband provided suitable alternative accommodation in the form of a two-bedroomed house or bungalow. The order also gave "liberty to apply". Subsequently, the husband having secured a two-bedroomed flat applied by summons to the master to vary his order by inserting the words "or flat" after the word "bungalow" and to order the wife to give up possession of the house. The master refused the application but, on appeal, Devlin J., in chambers, referred back to the master the question whether the flat was suitable alternative accommodation. The wife appealed to the Court of Appeal. Somervell L.J. took the view that the judge's order referring the matter back to the master proceeded on the basis that the order could be varied as asked for by the husband. Thereupon he put the question in this way on page 728:

"The question therefore is whether the order can be varied as asked. If it can, the question will then arise whether it should be; but the first question is whether it can, and reliance is placed by the husband on the words 'Liberty to apply'."

In the course of his judgment Somervell L.J. referred to the case of *Poisson and Woods* v. *Robertson and Turvey*[12] in which Stirling, L.J. said:

"... The present application could not be made under 'Liberty to apply'. The judgment contained a declaration as to the interests of the parties with 'Liberty to apply', but the addition of those words did not enable the court to deal with matters which did not arise in the course of working out the judgment."

Somervell L.J. referred to the phrase "working out the judgment" as having been used in other cases. *Abbott* v. *Abbott*[15] was also referred to as a decision which went the other way. It was concerned with a maintenance order in which the words "liberty to apply" were used. It was there held that these words did not make the court order a final order for on its true construction the parties contemplated and agreed that it can be varied if a change in financial circumstances brings about. On page 729, Somervell L.J. said:

"It seems to me that that was a decision which must be restricted to its subject-matter or similar subject-matters and that what the court decided was that that particular consent order, with the words 'Liberty to apply' was not a final and irrevocable order, but was one which, on its true construction, the parties contemplated and agreed could be varied if a change in financial circumstances came about; that is to say, on the principles which are very familiar to everybody in respect of maintenance orders."

In the instant case we are not concerned with maintenance orders and the words "liberty to apply" in the court order can mean no more than that the parties were at liberty to go back to the court for the purpose of working out the terms of settlement, such as approving the appointment of arbitrators and other experts for the purpose of paragraph 5 of the schedule The insertion of the date 29th February, 1970 in paragraph 4 as the last date for completion was clearly an error because February of that year had only 28 days. It was a clerical error arising from accidental slip and one which could easily have been corrected under rule 11 Order 28 of the Rules of the Supreme Court. It was not such a mistake which could be made a ground for setting aside the order. Indeed, in this connection the learned judge thought nothing of the mistake, being "clearly of the view that the day that was contemplated and intended by the parties at the time of settlement for the completion of the purchase was the last day of February, i.e. 28th February, 1970." In other words Madam Chin Ah Kwi(f) alias Chin Foong Ooi(f) was given approximately ten weeks to decide whether or not to buy the shares. Under paragraph 4 of the schedule time was of the essence of the settlement. Paragraph 5 expressly provided that if Madam Chin Ah Kwi(f) alias Chin Foong Ooi(f) failed to complete the purchase within the stipulated period, the right to buy shares not included in paragraph 3 would pass over to other directors. It is true that paragraph 8 gave all parties to the settlement the right of reasonable access to the company's books and records pending completion. But this was not a condition for completion. It may be that Madam Chin Ah Kwi(f) alias Chin Foong Ooi(f) would have to spend more than five million dollars for the purchase of the shares but this, as may be noticed from paragraph 3 of the schedule, was to depend on the undertaking to limit the debts of the company to three million dollars. She must have foreseen the difficulties of inquiring into all the affairs of the company within the short time available. But she was not obliged to buy the shares if she thought it was not worth her while to do so. Whether or not she was given reasonable access to the company's books and records is, therefore, not a question which can affect the operation of paragraph 4 of the schedule. It would appear to me that the arrangements under the settlement was a temporary expedient for resolving the dispute over the appointment of a government director to succeed the late Madam Chi Liung. It was in the interests of the company that the dispute should be resolved quickly as otherwise squabbles among directors would lead to costly litigations. Paragraph 8 clearly provided that after completion all orders governing the affairs of the company would be discharged.

I would allow this appeal with costs.

Appeal allowed.

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